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06 UNITED STATES DISTRICT COURT
07 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

08 DENNA RENEE VILLALOVOS,)
09 Plaintiff,) CASE NO. C11-1651-RSM-MAT
10 v.) REPORT AND RECOMMENDATION
11 MICHAEL J. ASTRUE, Commissioner of)
Social Security,)
12 Defendant.)
13 _____)

14 Plaintiff Denna Renee Villalovos appeals the final decision of the Commissioner of the
15 Social Security Administration (“Commissioner”) which denied her application for
16 Supplemental Security Income (“SSI”) under Title XIV of the Social Security Act, 42 U.S.C. §§
17 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth
18 below, the Court recommends that the Commissioner’s decision be REVERSED and
19 REMANDED for further administrative proceedings.

20 I. FACTS AND PROCEDURAL HISTORY

21 Plaintiff was born in 1964 and was 43 years old on the date her application was filed.
22 (Administrative Record (“AR”) at 22.) She has a seventh grade education. (AR 299.) Her

01 past work experience includes employment as a hand packager, store laborer, and home
02 attendant. (AR 21, 78, 247-49.) On April 30, 2008, she applied for SSI, alleging disability
03 beginning on March 1, 2005. (AR 14.) Plaintiff asserts she is disabled due to chronic lumbar
04 strain, depression, and panic disorder with agoraphobia. (AR 16, 295.)

05 The Commissioner denied plaintiff's claim initially and on reconsideration. (AR
06 127-30, 136-37.) Plaintiff requested a hearing, which took place on January 12, 2010. (AR
07 37-105.) On April 24, 2010, the ALJ issued a decision finding plaintiff not disabled. (AR
08 14-23.) Plaintiff's administrative appeal of the ALJ's decision was denied by the Appeals
09 Council (AR 1-5) making the ALJ's ruling the "final decision" of the Commissioner as that
10 term is defined by 42 U.S.C. § 405(g). On October 4, 2011, plaintiff timely filed the present
11 action challenging the Commissioner's decision. (Dkt. No. 1.)

12 II. JURISDICTION

13 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§
14 405(g) and 1383(c)(3).

15 III. DISCUSSION

16 The Commissioner follows a five-step sequential evaluation process for determining
17 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it
18 must be determined whether the claimant has engaged in substantial gainful activity. The ALJ
19 found plaintiff had not engaged in substantial gainful activity since April 30, 2008, the
20 application date. (AR 16.) At step two, it must be determined whether the claimant suffers
21 from a severe impairment. The ALJ found plaintiff had the following severe impairments:
22 chronic lumbar strain, depression, and panic disorder with agoraphobia. *Id.* Step three asks

01 whether the claimant's impairments meet or equal the criteria of a listed impairment. The ALJ
02 found that plaintiff's impairments did not meet or equal a listed impairment. *Id.* If the
03 claimant's impairments do not meet or equal a listing, the Commissioner must assess residual
04 functional capacity ("RFC") and determine at step four whether the claimant has demonstrated
05 an inability to perform past relevant work. The ALJ found plaintiff had the physical capacity
06 to perform light work, except she is able to remember, understand, and carry-out simple and
07 detailed, but not complex instructions or tasks. She can have occasional face-to-face
08 interactions with co-workers, supervisors, and the general public, and has no restrictions
09 regarding telephone interaction. (AR 18.) With that assessment, the ALJ found plaintiff was
10 unable to perform her past work. (AR 21.)

11 If the claimant is able to perform her past relevant work, she is not disabled; if the
12 opposite is true, then the burden shifts to the Commissioner at step five to show that the
13 claimant can perform other work that exists in significant numbers in the national economy,
14 taking into consideration the claimant's RFC, age, education, and work experience. The ALJ
15 determined there were jobs that existed in significant numbers in the national economy that
16 plaintiff could perform, such as final assembler, telephone solicitor, document scanner, cleaner
17 housekeeper, and mail clerk. (AR 22-23.) Accordingly, the ALJ concluded plaintiff was not
18 disabled. (AR 23.)

19 Plaintiff argues the ALJ's decision should be reversed and remanded for further
20 administrative proceedings because the ALJ erred: (1) in evaluating the opinions of
21 examining psychiatrist Paul Michels, M.D., and non-examining psychiatrists Eugene Kester,
22 M.D., and Steven Haney, M.D.; and (2) in finding she could work as a telephone solicitor.

(Dkt. No. 16.) The Commissioner argues that the ALJ’s decision is supported by substantial evidence, is free of legal error, and should be affirmed. (Dkt. No. 20.)

A. Medical Opinion Evidence

In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Where not contradicted by another physician, a treating or examining physician’s opinion may be rejected only for “‘clear and convincing’” reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician’s opinion may not be rejected without “‘specific and legitimate reasons’ supported by substantial evidence in the record for so doing.” *Id.* at 830 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

The ALJ may reject physicians’ opinions “by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). Rather than merely stating his conclusions, the ALJ “must set forth his own interpretations and explain why they, rather than the doctors’, are correct.” *Id.*

1. *Paul Michels, M.D.*

Consultative psychiatrist Paul Michels, M.D., examined plaintiff on February 8, 2007, for the Washington State Social Security Disability Determination Services (“DDS”). (AR 466-71.) Dr. Michels diagnosed plaintiff with Major Depressive Disorder, Recurrent, Moderate, and Probable Panic Disorder with Agoraphobia. (AR 470.) He noted that there

01 was no evidence to support a diagnosis of attention-deficit disorder, and that plaintiff's focus
02 and concentration problems were likely symptoms of her depression and anxiety rather than a
03 separate disorder. *Id.* Dr. Michels opined,

04 At present the claimant's focus and concentration appear fair. Pace and
05 persistence seem moderately impaired. She probably has the intellectual capacity
06 to understand, remember and follow complicated or simple instructions. Her
07 depression and anxiety may create occasional difficulty completing specific tasks
in a timely or consistent manner. Interactions with others may be mildly to
moderately impaired by her depression and anxiety. Stress might cause transient
worsening in her symptoms.

08 (AR 470-71 (emphasis added).)

09 Plaintiff argues that although Dr. Michels reported her "pace and persistence seem[ed]
10 moderately impaired," the ALJ found no reduction in plaintiff's pace and persistence. In
11 addition, while Dr. Michels reported that plaintiff's "depression and anxiety may create
12 occasional difficulty completing specific tasks in a timely or consistent manner," the ALJ
13 recognized no difficulty in completing specific tasks in a timely or consistent manner. Plaintiff
14 contends that although the ALJ gave "substantial weight" to Dr. Michels' opinion, he failed to
15 recognize that Dr. Michels opined that plaintiff was more limited in those two ways. (AR 20.)
16 Plaintiff asserts, "because the ALJ did not recognize that Dr. Michels opined that [she] was
17 significantly more limited in those way[s], the ALJ did not provide legally sufficient reasons for
18 implicitly rejecting Dr. Michels's opinions about them." (Dkt. No. 16 at 9.)

19 The Commissioner claims plaintiff merely argues for a different interpretation of the
20 medical evidence. Dkt. No. 20 at 5-7. The Commissioner also asserts that Dr. Michels was
21 equivocal about whether plaintiff "may" have difficulty completing tasks, and that the ALJ is
22 responsible for resolving ambiguities in the medical evidence. *Id.* at 5. The Commissioner

01 contends that the ALJ properly considered Dr. Michels' opinion and accounted for it in the RFC
02 assessment. *Id.* at 7.

03 The record is silent on why the ALJ ignored Dr. Michels' opinion that plaintiff's
04 persistence and pace were moderately impaired, or his opinion that plaintiff may have
05 occasional difficulty completing specific tasks in a timely or consistent manner. Perhaps it
06 was for the reasons urged by the Commissioner. However, the ALJ did not provide these
07 reasons. It is just as probable that the ALJ overlooked these restrictions. In any event, the
08 ALJ erred by reaching the conclusion that plaintiff could perform simple and detailed tasks
09 without taking into account the restrictions mentioned by Dr. Michels, or providing specific and
10 legitimate reasons for rejecting them. Accordingly, substantial evidence does not support the
11 ALJ's RFC assessment, or the hypothetical question to the vocational expert upon which the
12 ALJ relied. On remand, the ALJ must reassess the opinions of Dr. Michels.

13 2. *Eugene Kester, M.D., and Steven Haney, M.D.*

14 On July 7, 2008, DDS psychiatrist Eugene Kester, M.D., reviewed plaintiff's records
15 and completed a mental residual functional capacity assessment ("MRFC"). (AR 674-76.)
16 Dr. Kester opined as follows:

- 17 A: Able to understand and remember more simple instructions required in
 unskilled work.
18 B: Lapses in CPP [concentration, persistence, and pace] may interfere with
 ability to carry out detailed instructions, maintain attention for extended
19 periods and keep a normal schedule. [Claimant] able to maintain
 concentration levels for unskilled work.
20 C: Able to work with the general public on a superficial level. Able to
 maintain coworker relations on a work related level.
21 D: No adaptive limitations noted.

22 (AR 676 (emphasis added).) On September 27, 2008, Steven Haney, M.D., reviewed all of the

01 evidence, and affirmed Dr. Kester’s assessment as written. (AR 742.)

02 The ALJ specifically noted that Dr. Kester found plaintiff had “moderate limitations in .
03 . . concentration, persistence, and pace,” and purportedly accorded “substantial weight” to Dr.
04 Kester’s opinion. (AR 21.) However, the RFC failed to take into account Dr. Kester’s
05 opinion that plaintiff may have lapses in concentration, persistence, and pace interfering with
06 her ability to carry out detailed instructions. (AR 21, 676.) Moreover, the RFC specifically
07 indicated that plaintiff had the ability to “remember, understand, or carry out simple and
08 *detailed*, but not complex instructions or tasks.” (AR 18 (emphasis added).)

09 Plaintiff argues that the ALJ failed to give legally sufficient reasons for implicitly
10 rejecting Dr. Kester’s opinion that plaintiff may have lapses in persistence or pace interfering
11 with her ability to carry out detailed instructions. (Dkt. No. 16 at 12.) The Commissioner
12 claims that the ALJ properly addressed the opinions of Drs. Kester and Haney, and accounted
13 for all credible limitations in the RFC assessment. (Dkt. No. 20 at 8.) The Commissioner
14 does not cite any part of the ALJ’s decision wherein he found the opinions of Drs. Kester and
15 Haney not credible. Plaintiff describes the Commissioner’s response as proffering improper
16 post hoc rationalizations. The Court reviews the ALJ’s decision “based on the reasoning and
17 factual findings offered by the ALJ — not post hoc rationalizations that attempt to intuit what
18 the adjudicator may have been thinking.” *Bray v. Comm’r of SSA*, 554 F.3d 1219, 1225 (9th
19 Cir. 2009). The ALJ here adopted an RFC that appears contrary to Dr. Kester’s opinion
20 without adequately explaining why the ALJ’s assessment rather than the doctor’s was correct.
21 The Commissioner’s post hoc explanation, even if correct, is insufficient to cure the ALJ’s
22 error. On remand, the ALJ must reassess the opinions of Drs. Kester and Haney.

01 B. Step Five

02 At step five, the ALJ relied on vocational expert testimony to conclude that plaintiff
03 could perform other jobs in the national economy, such as final assembler (with 86,000 national
04 jobs and 187 Washington jobs), telephone solicitor (with 197,000 national jobs and 7,100
05 Washington jobs), document scanner (with 1,700 national jobs and 175 Washington jobs),
06 cleaner housekeeper (with 525,000 with national jobs and 5,700 Washington jobs), and mail
07 clerk (with 15,000 national jobs and 360 Washington jobs). (AR 22-23.)

08 Plaintiff argues that she could not work as a telephone solicitor given the ALJ's RFC
09 assessment. (Dkt. No. 16 at 14-15.) Specifically, plaintiff contends that because the ALJ's
10 RFC assessment limited her to "occasional face-to-face interaction with . . . supervisors," she
11 could not tolerate the continuous supervision during the training period needed to work as a
12 telephone solicitor. (AR 18, 87, 89.) The Commissioner does not dispute that the telephone
13 solicitor job was inconsistent with the ALJ's RFC assessment, but argues there was no harmful
14 error because the ALJ identified four other jobs that exist in significant numbers in the national
15 economy that plaintiff could perform. (Dkt. No. 20 at 9-10.) As the Commissioner does not
16 dispute that the telephone solicitor job was inconsistent with the ALJ's RFC assessment, on
17 remand, the ALJ should not again find that plaintiff could work as a telephone solicitor.

18 Because the Court recommends remand for further consideration of the medical
19 evidence, the ALJ will necessarily have to reassess plaintiff's RFC and conduct a new step five
20 analysis that incorporates any changes in plaintiff's RFC. If the ALJ's RFC assessment is
21 revised, the ALJ will also call a VE to testify about jobs that may exist with a properly framed
22 hypothetical that incorporates all of plaintiff's limitations.

01 IV. CONCLUSION

02 For the foregoing reasons, the Court recommends that the Commissioner's decision be
03 REVERSED and REMANDED for further administrative proceedings not inconsistent with
04 this Report and Recommendation.

05 DATED this 3rd day of May, 2012.

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08 Mary Alice Theiler
09 United States Magistrate Judge
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